Supreme Court, U.S.
FILED
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No. 99-351

IN THE

Supreme Court of the United States

MARVA SALEM,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF GEORGIA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner raised the issue of the application of the Eighth Amendment's Excessive Fines Clause in the lower courts so as to preserve the issue for appeal; and if so, whether the forfeiture of the property in this case is proportionate to the crimes involved so as to be permissible under the Excessive Fines Clause of the Eighth Amendment pursuant to the Court's holding in *United States v. Bajakajian*, 524 U.S. 331 (1998).

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STATEMENT OF THE CASE

The following evidence was presented at the three day hearing in this forfeiture case:

Willie Lawson operated a nightclub adjacent to a public school in Reidsville, Tattnall County, Georgia. During the period from 1987 to March 1, 1996, Lawson had been investigated by local, state and federal law enforcement officers concerning the sale and distribution of cocaine and marijuana at the nightclub. In 1991 and 1992, Lawson told the police chief of Reidsville that two people were distributing controlled substances in Tattnall and Chatham Counties. Lawson also told the police chief that he had once used cocaine; he admitted that he had buried approximately $53,000.00 in currency in a lard bucket outside of the nightclub; he told the chief that if he were sent to prison he would not name others to the police and stated that if he was sent to prison a drug war between drug dealers would break out at the nightclub.

In 1991, the police chief had observed Lawson, who was standing outside the nightclub, throw something to the ground as the police chief approached him. The chief recovered a pill bottle containing fourteen pieces of crack cocaine. In 1992, the police chief utilized a confidential informant who purchased cocaine on two occasions from Willie Lawson at the nightclub.

Beginning in 1989 and ending in 1992, a DEA agent conducted an investigation of Lawson at the nightclub. The agent testified that during his investigation, he along with another agent and a confidential informant purchased cocaine from Willie Lawson in the nightclub in 1992. This transaction was recorded on tape and the tape was introduced and played at the 1996 forfeiture hearing.

In 1993, an undercover agent assigned to the local drug task force utilized a confidential informant on two occasions to purchase cocaine from another person at Lawson's nightclub. On the date of the second purchase of cocaine, Lawson appeared on the porch of the club and told the informant to take the undercover agent away from the club because he (the agent) might be a law enforcement officer. The day after this encounter, the agent and confidential informant returned to the nightclub where Lawson again ordered them to leave, and told them that the agent might have a "gun and a badge." These statements were recorded on tape and were introduced and played at the 1996 forfeiture hearing.

Another local law enforcement officer testified that in 1995 Lawson told him that he had dealt cocaine and marijuana and had himself become addicted to cocaine for a period of five years. Lawson told this officer that during a search of his nightclub by the drug task force he had successfully hidden a duffel bag full of marijuana by throwing the bag and its contents over a fence.

Willie Lawson was not arrested for any of the foregoing offenses.

Prior to the execution of the search warrant by the drug task force on March 1, 1996, a confidential informant was utilized on five occasions in February, 1996 to go to Lawson's club in order to purchase cocaine. The informant on several occasions purchased cocaine inside the club from Lawson's son, Al Williams. On one occasion the informant was directed by Lawson not to purchase cocaine from his son, but instead to go outside and purchase cocaine from another party. Some of these drug transactions were recorded

on audio tape. All of the five cocaine purchases made by the informant in February, 1996 consisted of small amounts of crack cocaine contained in small clear baggies, each of which had a pin hole in it.

During the execution of the search warrant, police found and videotaped the following: In Lawson's living quarters police found nine small baggies containing a total of 10.1 grams of marijuana, the guns which were seized and forfeited, the bank documents, checks, and the will. In the public area of the nightclub, police found several baggies of cocaine and marijuana on the floor, and found a bottle of lactose, baggies hanging on safety pins, numerous razor blades and "blunts" in the service area of the club. In the ceiling, police found several ounces of lactose, over one thousand baggies, a black balloon containing cocaine residue, a plastic bag and duct tape, and other *indicia* of drug use and drug dealing. One patron of the club admitted that she had purchased her marijuana at the club. After being advised of his *Miranda* rights, Lawson told police that he distributed marijuana to women.

After Willie Lawson was sentenced in the case arising from the March 1, 1996 arrest, his sentence was subsequently revoked because of his arrest on February 24, 1998 in another judicial circuit for the offense of possession of marijuana with intent to distribute. (*See* attached App. A).

Marva Salem claimed that she was an innocent owner of the seized property. She testified that she had known Lawson for many years and had once been romantically involved with him. She testified that because of Lawson's poor health, he gave her all his money and his real estate; and that she had left all the documents with him because she

was getting a divorce from her husband. She testified that she knew nothing about any drug use by Lawson or at the club, and stated that she was taken by Lawson to an attorney's office in January, 1996, shortly after Lawson had put the bank accounts and the real estate in her name, in order to execute her will leaving all of the property that Lawson had just given her to him even though she had four children, three of whom were over twenty-one years of age.

Both Willie Lawson and Marva Salem claimed the seized property. In addition to claiming that she was an innocent owner of the property, Petitioner claimed in her Answer that she was holding the property for Willie Lawson.

The trial court held that the State had proven by a preponderance of the evidence that all of the seized property except for the certificate of deposit in the amount of $6,500.00 was forfeitable to the State of Georgia pursuant to O.C.G.A. § 16-13-49.

Both Petitioner and Willie Lawson filed appeals from the order of the lower court. Lawson's appeal was dismissed on procedural grounds. Petitioner's appeal did not raise the issue of the Eighth Amendment's Excessive Fines Clause. The Court of Appeals of Georgia affirmed the decision of the lower court, holding that Petitioner had failed to prove by a preponderance of the evidence that she was an innocent owner under the provisions of O.C.G.A. § 16-13-49(e).

Petitioner applied for certiorari to the Supreme Court of Georgia. The Court granted certiorari to consider whether the forfeiture in this case was proportionate to the crimes involved so as to be permissible under the Excessive Fines Clause of the Eighth Amendment. The Court heard oral

arguments on the case on March 9, 1999. On April 9, 1999, the Supreme Court of Georgia vacated the writ of certiorari and denied the Motion for Reconsideration on May 3, 1999. The Motion to Remand to the court of appeals was denied on May 28, 1999.

Marva Salem now petitions this Court to grant certiorari in order to apply the Eighth Amendment's Excessive Fines Clause to this case, although neither Petitioner nor the true owner of the property raised this issue in the Court of Appeals of Georgia.

REASONS FOR DENYING THE WRIT

Willie Lawson's interests in and ownership of the property are not at issue in this case, for he did not perfect his appeal to the Court of Appeals of Georgia. The Court of Appeals of Georgia was correct in its holding that Petitioner was not an innocent owner of the property in that Petitioner failed to meet the requirements of O.C.G.A. § 16-13-49(e).

I.

THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED BECAUSE THE PETITIONER FAILED TO RAISE THE ISSUE OF EXCESSIVE FINES SO AS TO PRESERVE THE ISSUE FOR APPEAL.

Petitioner has sought in the Supreme Court of Georgia and in this Court review of error not raised in the Court of Appeals of Georgia. An error not enumerated or argued in the Petitioner's brief in the Court of Appeals of Georgia must be treated as abandoned. The issue of excessiveness was raised only briefly in the trial court, and was raised on behalf

of Willie Lawson. Since the answer of Willie Lawson as to the certificate of deposit and the bank account was stricken by the court on procedural grounds, and since Lawson's appeal was dismissed by the Court of Appeals, it was incumbent upon Petitioner to raise in the Court of Appeals of Georgia the issue of the Eighth Amendment's Excessive Fines Clause as it related to Petitioner, That Petitioner failed to do this is fatal to her appeal. On appeal in the appellate courts of Georgia, enumerations of error must be set out and supported with appropriate argument and citation to the record, or they will be deemed abandoned. *Hunter v. State*, 201 Ga. App. 9 (1991); *Herndon v. State*, 229 Ga. App. 457 (1997).

Petitioner did not cite the Excessive Fines Clause of the Eighth Amendment as an enumeration of error nor did she support this allegation by argument or citation of authority in Petitioner's brief to the Court of Appeals of Georgia. Therefore, this issue was abandoned at that stage of these proceedings. *Management By Design v. Lakeview Utilities, Inc.*, 233 Ga. App. 711 (1998); *McMann v. Mockler*, 233 Ga. App. 279 (1998); *Durben v. American Materials, Inc., et al.*, 232 Ga. App. 750 (1998).

II.

PETITIONER HAS NO STANDING TO OBJECT TO THE FORFEITURE OF THE PROPERTY SINCE PETITIONER IS MERELY A STRAW OWNER AND THEREFORE HAS NO REAL INTEREST IN THE FORFEITED PROPERTY AND SUFFERED NO INJURY FROM THE FORFEITURE.

The trial court and the Court of Appeals of Georgia both held that Petitioner was not an innocent owner of the forfeited property within the meaning of O.C.G.A. § 16-13-49(e), and therefore was not entitled to the protection afforded innocent owners by the statute. The transfer of legal title to property in an attempt to avoid losing property through civil forfeiture is a common technique employed by persons in the drug business in order to attempt to put property beyond the reach of asset forfeiture by the government. Unless the holder of the legal title also exercises dominion and control over the property, the transfer of the property is likely to be viewed by the courts as a sham. The possessor of mere legal title without more will be considered by the courts as a nominal owner or straw owner. *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993).

Petitioner was not an innocent owner at the time of the transfer of the property. Despite having known Willie Lawson for many years, and despite admitting to maintaining an intimate personal relationship with him, Petitioner claimed that she did not know that Lawson had been addicted to cocaine for five years, and claimed that although she went to Lawson's club once a month, she saw no evidence that drugs were being used or stored there. Because drug dealers often set up sham transfers by means of gifts, the courts have

instituted the rule requiring that the recipient who receives property show that he is a bona fide purchaser for value. *United States v. 92 Buena Vista Ave.*, 504 U.S. 111 (1993). Petitioner has not shown that she was a bona fide purchaser for value.

The evidence presented by the State in this forfeiture hearing clearly showed that Willie Lawson retained possession of all monies and real estate and that he even required Petitioner to sign a will leaving to Lawson upon Petitioner's death everything that he purportedly transferred to Petitioner. The trial court did not err in finding that Willie Lawson was the owner of the forfeited property. Petitioner did not meet her burden of proof in proving that she was an innocent owner of the property.

III.

THE FORFEITURE OF THE PROPERTY IN THIS CASE DID NOT VIOLATE THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT.

Petitioner asserts that because Willie Lawson was only convicted of possession of marijuana with intent to distribute and possession of marijuana with intent to distribute within one thousand feet of a public school, that the forfeiture of the real property and the monies was excessive within the meaning of the Excessive Fines Clause. Had this case rested solely upon the offenses for which Lawson entered pleas of guilty, this issue would be a difficult one. However, in proving the nexus of the seized property to the illegal drug activities, the State proved the following during the hearing of this case:

(1) The State proved that the use of the property in the offenses was deliberately planned and not merely incidental and fortuitous. The State proved by a preponderance of the evidence that Willie Lawson deliberately stored money and drugs at his nightclub as early as 1991 or 1992.

(2) The State proved that the seized property was important to the success of the illegal activity.

(3) The State proved that the seized property was used for illegal purposes over a period of many years and proved the spatial extent of its use.

(4) The State proved that the illegal use of the seized property had been repeated over a period of many years and was not an isolated incident.

(5) The State proved that the purpose of maintaining and using the seized property was to carry out the offenses of selling and distributing cocaine and marijuana.

In *Austin v. United States*, 509 U.S. 602 (1993), this Court held that the seizure of Austin's home and legitimate business enterprise constituted punishment for a crime and therefore the seizure was subject to the Excessive Fines Clause of the Eighth Amendment. This Court had refused to extend the Excessive Fines Clause to private parties in *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). *Austin* allows courts to consider other factors in addition to nexus in determining whether the forfeiture of property is excessive.

The Supreme Court of Georgia applied the rule of *Austin* in *Thorp v. State of Georgia*, 264 Ga. 712 (1994) and required

the courts to consider three factors in determining whether the forfeiture of property is excessive. In applying *Thorp*'s three factors to this case, the forfeiture cannot be said to be excessive. The first factor, consideration of the inherent gravity of the offense compared with the harshness of the penalty, is satisfied in this case in that Willie Lawson entered pleas of guilty to possession of marijuana with intent to distribute, an offense which carries a penalty up to ten years in prison and a fine of $10,000.00; and to possession of marijuana with intent to distribute within one thousand feet of a school, an offense which carries a penalty up to twenty years in prison and a fine of $20,000.00. (O.C.G.A. § 16-13-32.4) In addition, the State proved by a preponderance of the evidence that Lawson had possessed, sold and stored cocaine and marijuana on and about the premises of his nightclub over a period of more than five years. Had Lawson been prosecuted for the offenses testified to at his trial, he would have been subject to extensive prison sentences and large fines. In considering all of the evidence presented by the State at the forfeiture hearing concerning the number of cocaine sales made to undercover agents and confidential informants by and with the consent of Willie Lawson at his nightclub and the statements that Lawson made to several law enforcement officers concerning his involvement in the drug trade, it cannot be said that the forfeiture of the money and real estate was excessive.

The second factor, whether the property was close enough to the offense to render it guilty, was proved at the trial of the case. This was not, as in *Austin*, an isolated case of one sale of which incidentally occurred at the nightclub. The evidence showed that Lawson stored his documents relating to the certificate of deposit and bank account at the nightclub, and that he routinely used, and allowed others to use the nightclub to sell, distribute and store cocaine and marijuana over a period of years.

The third factor of *Thorp*, whether the criminal activity involving the property was extensive in terms of time and/or spatial use, was clearly proved by a preponderance of the evidence in the forfeiture hearing. Because the State proved at the hearing the extensive use of the property for many years in facilitating the sale, use, distribution and storage of marijuana and cocaine, all the requirements of *Austin* and *Thorp* were satisfied. The extensive criminal activities which Willie Lawson conducted in conjunction with the forfeited property prior to the March 1, 1996 offenses for which Lawson was sentenced, may properly be considered by the courts in determining whether the forfeiture was excessive. *Alexander v. United States*, 509 U.S. 544 (1993).

The standard set out in *United States v. Bajakajian*, 524 U.S. 331 (1998) is an adoption of the "gross disproportionality" standard articulated in criminal cases in *Solem v. Helm*, 463 U.S. 277 (1983). The forfeiture statute was enacted to prevent drug dealers such as Willie Lawson from profiting from his illegal activities. The maximum penalty for the offenses for which Lawson pled guilty was a total of thirty years in prison and fines totaling $30,000.00, which were not dwarfed by the forfeiture sought by the State. If Willie Lawson had been prosecuted on the offenses that the State proved at the hearing that he had committed over a period of years, the penalties for the numerous offenses committed by and participated in by Lawson would have exceeded one hundred years in prison and fines exceeding the amount of the forfeiture. Therefore the government is not exacting too high a penalty in relation to the offense committed.

The harm that resulted to the community by the numerous sales, use and distribution of cocaine and

marijuana over a period of many years in this case was substantial. The use of drugs adjacent to a public school was significant over a period of years. In this forfeiture action the government proceeded against both the property involved in the drug transactions and proceeded criminally against Willie Lawson who owned and controlled the property that was forfeited. The State proved by a preponderance of the evidence that the property belonging to Willie Lawson had for many years been associated with and used for the primary purpose of facilitating the sales of controlled substances. The forfeiture of the property therefore does not violate the "gross disproportionality" standard of this Court's decision in *Bajakajian*, nor does it violate the Excessive Fines Clause of the Eighth Amendment.

CONCLUSION

WHEREFORE, for all the above and foregoing reasons, Respondent prays that this Court deny this petition for a writ of certiorari as the decision of the Supreme Court of Georgia to deny Petitioner's request for remand was proper.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF MODIFICATION/ REVOCATION OF PROBATION OF THE SUPERIOR COURT OF TATTNALL COUNTY, GEORGIA IN *THE STATE OF GEORGIA v. WILLIE A. LAWSON*, DOCKET NO. 96-R-148 DATED MAY 18, 1998 AND FILED MAY 26, 1998

IN THE SUPERIOR COURT
OF TATTNALL COUNTY, GEORGIA

DOCKET NO. 96-R-148

THE STATE OF GEORGIA

VS

WILLIE A. LAWSON

ORDER OF MODIFICATION/REVOCATION OF PROBATION

WHEREAS, pursuant to the foregoing petition and notice given to the Defendant, a full hearing was conducted by this Court on the 18th day of May, 1998 in accordance with O.C.G.A. §42-8-38, §17-10-1 (a)(3)(A) and the Court has adjudged that the terms and conditions of probation had been violated as set forth in the following particulars:

By a preponderance of the evidence the defendant violated condition #1 of his sentence of probation by committing the offense of Possession of Marijuana with Intent to Distribute, a felony, on February 24, 1998, in Lyons, Toombs County, Georgia.

* * *

Appendix A

☒ New felony offense(s)

And the Defendant is therefore eligible in accordance with O.C.G.A. §17-10-1 (a)(3)(A) for Modification/Revocation of sentence to Prison, or a Community Corrections Alternative or County Jail.

THEREFORE, it is ordered and adjudged that the probation provisions in said original sentence be:

☒ REVOKED in accordance with O.C.G.A. §42-8-38, §17-10-1 (a)(3)(A) and the Defendant is hereby required to serve the balance in the State Penal System, or such other place as the Commissioner of Corrections may direct;

* * *

This 18 day of MAY, 1998.

s/ [illegible]
Judge, Tattnall County Superior Court

* * *

APPENDIX B — PETITION FOR MODIFICATION/ REVOCATION OF PROBATION AND ORDER OF THE SUPERIOR COURT OF TATTNALL COUNTY, GEORGIA IN *THE STATE OF GEORGIA v. WILLIE A. LAWSON*, DOCKET NO. 96-R-148 DATED MAY 11, 1998

IN THE SUPERIOR COURT
OF TATTNALL COUNTY, GEORGIA

DOCKET NO. 96-R-148

THE STATE OF GEORGIA

VS

WILLIE A. LAWSON

PETITION FOR MODIFICATION/ REVOCATION OF PROBATION

Now comes Dannie C. Miller, Jr., Probation Officer III, Atlantic Judicial Circuit, in the name and behalf of the State of Georgia, and brings this action against **Willie A. Lawson**, hereinafter called the Defendant, and shows:

I.

That the Defendant entered a plea of guilty to the offense(s) of **Ct.2, VGCSA, Possession of Marijuana with Intent to Distribute, a felony; Ct.4, VGCSA, Possession of Marijuana with Intent to Distribute within 1,000 feet of a Public School, (a felony)** at the October Term, 1996.

Appendix B

II.

That this Court, on the **8th** day of **January, 1997**, did sentence the Defendant to serve a period of Ct.2, four (4) years; Ct.4, two (2) years concurrent with Ct.2 in the State Penal System.

III.

That this Court, by proper order, however, permitted the Defendant to serve said sentence on probation, the terms and conditions of which are fully set forth in the copy of said sentence which is attached hereto, marked as Exhibit "A", and specifically incorporated herein.

IV.

That the Defendant has violated the terms and conditions of probation in the following particulars:

The defendant violated condition #1 of his sentence of probation which reads as follows: "Do not violate the criminal laws of any governmental unit." ..... in that on February 24, 1998, the defendant committed the offense of Possession of Marijuana with Intent to Distribute, a felony, in Lyons, Toombs County, Georgia.

V.

WHEREFORE, the State of Georgia prays that the citation for modification/revocation of probation be served on the Defendant and that the Defendant be directed to appear

before this Court on a day to be fixed by the Court and at that time show cause why said probation should not be modified/revoked.

The 11th day of May, 1998.

s/ Dannie C. Miller, Jr.
Dannie C. Miller, Jr., P. O. III
Atlantic Judicial Circuit

Appendix B

IN THE SUPERIOR COURT
OF TATTNALL COUNTY, GEORGIA

DOCKET NO. 96-R-148

THE STATE OF GEORGIA

VS

WILLIE A. LAWSON

ORDER

Having read and considered the foregoing petition, it is hereby ordered that the Defendant be served with a copy of same and that the Defendant show cause before the Court on the **18th** day of **May, 1998**, at the Tattnall County Courthouse, in Reidsville, Georgia, at **9:00 a.m.** why said probation should not be modified/revoked.

This 11 day of May, 1998.

s/ Holly D. Burkhalter, Deputy Clerk

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing petition upon the Defendant in person (by mail).

This 12 day of May, 1998.

s/ [illegible]

Appendix B

ACKNOWLEDGMENT

I hereby acknowledge service of the foregoing petition and that I am aware that I may employ legal representation at said hearing or be represented otherwise as the Court may direct.

This 12 day of May, 19 . . . .

s/ Willie H Lawson
Defendant